

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation	)	CC Docket No. 01-92
Regime	)	

**OPPOSITION TO THE MISSOURI INDEPENDENT TELEPHONE GROUP  
MOTION TO DISMISS**

The undersigned providers of commercial mobile radio services (collectively, “CMRS Petitioners”),<sup>1</sup> pursuant to Section 1.45(b) of the rules of the Federal Communications Commission (“FCC” or “Commission”),<sup>2</sup> oppose the motion filed on August 3, 2004, by the Missouri Independent Telephone Group (“MITG”), a group of six Missouri rural incumbent local exchange carriers, seeking dismissal of the CMRS Petitioners’ September 6, 2002 declaratory ruling petition (“CMRS Petition”).

**I. MITG’S MOTION IS PROCEDURALLY DEFICIENT**

The MITG carriers claim that the CMRS Petition is procedurally deficient, when in fact it is the MITG motion to dismiss that is procedurally infirm. The CMRS Petitioners filed their declaratory ruling petition nearly two years ago, on September 6, 2002. Ordinarily, oppositions to petitions (including motions to dismiss on procedural grounds) are due “within 10 days after the original pleading is filed.”<sup>3</sup> Here, the Commission established a longer comment period, and under its public notice, comments and oppositions to the CMRS petition were due on October 18,

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<sup>1</sup> The CMRS Petitioners include: T-Mobile USA, Inc.; Western Wireless Corporation; Nextel Communications, Inc.; and Nextel Partners, Inc.

<sup>2</sup> 47 C.F.R. § 1.45(b).

<sup>3</sup> *Id.*

2002.<sup>4</sup> Clearly, a motion to dismiss a petition filed nearly two years after the authorized comment date is tardy and must be stricken as untimely.<sup>5</sup>

## II. MITG'S PROCEDURAL ARGUMENT IS WITHOUT MERIT

The MITG carriers raise the same procedural argument that certain Montana rural local exchange carriers ("RLECs") raised nearly two years ago. Specifically, the carriers argue that the CMRS Petitioners failed to serve a copy of their Petition on any state commission, as required under Note 1 to FCC Rule 1.1206(a). No change in fact or law has occurred during the last two years to cure the defects in this argument.<sup>6</sup>

MITG's (as well as the Montana RLECs') procedural argument lacks merit because the service requirement under Note 1 is not relevant to the CMRS Petition, as the CMRS Petitioners have previously explained.<sup>7</sup> Note 1 requires a party seeking to invalidate an order or rule of a state public utility commission ("PUC") to serve a copy of the petition on the PUC that is the subject of the petition.<sup>8</sup> The Commission adopted this requirement because "[i]n some cases, the jurisdictions *named in the petition* were not aware of the petition or the allegations made about them in the petition."<sup>9</sup> The requirement was intended to allow state and local governments that are the subject of a petition seeking preemption an "opportunity to respond in a timely manner to the allegations made."<sup>10</sup>

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<sup>4</sup> See FCC Public Notice, *Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic*, 17 FCC Rcd 19046 (2002) ("CMRS Petition Public Notice").

<sup>5</sup> See, e.g., *Supreme Radio Communications*, 14 FCC Rcd 19375 (WTB 1999) (motion to dismiss stricken as untimely when filed 22 days after petition was filed); *Mile Hi Cable Partners v. Public Serv. Co. Colorado*, 13 FCC Rcd 13407 (1998) (FCC refuses to consider motion to dismiss filed 30 days after petition is filed).

<sup>6</sup> MITG Motion to Dismiss at 1 ¶ 1.

<sup>7</sup> See Joint CMRS Petitioners Opposition to the Montana ILEC Motion to Discuss, CC Docket No. 01-92 (Oct. 31, 2002). It is noteworthy that the MITG motion does not discuss any of the points that the CMRS Petitioners raised in their Montana opposition.

<sup>8</sup> See 47 C.F.R. § 1.1206(a), Note 1.

<sup>9</sup> See *Amendment of 47 C.F.R. §1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, 14 FCC Rcd 18831, 18838 ¶ 28 (1999) (emphasis added).

<sup>10</sup> *Id.* ¶ 29.

In their Petition, the CMRS Petitioners neither asked the Commission to invalidate any PUC order or rule nor identified any particular state PUC action as warranting preemption. Rather, they asked the Commission to reaffirm existing federal law, as made apparent from the first page of their Petition:

[The CMRS Petitioners] petition the Commission to enter a declaratory ruling reaffirming that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of telecommunications under the Communications Act.<sup>11</sup>

Furthermore, the CMRS Petitioners properly filed their Petition in an existing rulemaking proceeding, CC Docket No. 01-92. In fact, the FCC public notice of the CMRS Petition confirmed that the petition would be considered as part of the larger rulemaking proceeding and not as a separate declaratory ruling proceeding.<sup>12</sup> The FCC's rules governing rulemaking proceedings do not require service of copies on any parties,<sup>13</sup> except for specific filings such as oppositions to petitions for reconsideration and replies to those oppositions.<sup>14</sup> Thus, because the CMRS Petition was filed as part of a larger rulemaking proceeding, it must be treated like other pleadings filed in rulemaking proceedings and is not subject to any service requirements.

Even assuming that Note 1 to Section 1.1206(a) is applicable, the rule's underlying purpose of providing notice to affected state PUCs was in fact achieved here. The Commission issued a public notice specifically inviting the general public, including state PUCs, to submit comments and reply comments on the CMRS Petition.<sup>15</sup> Thus, state PUCs, many of whom are

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<sup>11</sup> CMRS Declaratory Ruling Petition at 1.

<sup>12</sup> See CMRS Petition Public Notice.

<sup>13</sup> See 47 C.F.R. §§ 1.399-1.430.

<sup>14</sup> See *id.* § 1.429(f), (g).

<sup>15</sup> See CMRS Petition Public Notice.

parties to the rulemaking proceeding, had ample opportunity to register any concerns regarding the CMRS Petition.<sup>16</sup>

### III. CONCLUSION

For the forgoing reasons, the CMRS Petitioners respectfully request that the Commission deny the Motion to Dismiss filed by the MITG carriers.

Respectfully submitted,

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<sup>16</sup> T-Mobile, in its July 8, 2004 ex parte letter, summarized the federal court decisions that have been rendered since the CMRS Petition was filed in September 2002. In their motion to dismiss, the MITG carriers ask the Commission to “deny Petitioner T-Mobile's requested relief set forth in its written Ex Parte Communication.” MITG Motion to Dismiss at 1. The MITG carriers, however, do not present a single argument in support of this request, and the Commission should reject this request on this ground alone.

## **CERTIFICATE OF SERVICE**

I, Theresa Rollins, hereby certify that on this 13<sup>th</sup> day of August 2004, copies of the foregoing **Opposition** were served by electronic mail on the following, unless otherwise indicated:

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